The Central Law Journal.

ST. LOUIS, OCTOBER 1, 1880.

CLOUDS UPON TITLE.

Courts of equity, from an early time, were in the habit of entertaining jurisdiction of bills brought for the purpose of removing "clouds upon title." These bills were in the nature of bills *quia timet*. They were filed not because any injury had already been done, but because the complainant apprehended a possible future injury, against which he sought to be protected by the interposition of the equity powers of the courts. The right to invoke the interposition of the courts was in general confined to those cases in which a party had already been injured in his rights He was bound to wait until his rights had been actually interfered with. And the reason why he could not in general implead another from whom he merely anticipated an injury, was that the courts ordinarily had occupation enough in determining controversies which had already become practical, without spending their time in hearing discussions respecting merely speculative controversies. But every rule is said to have its exceptions, and the exceptions to this rule are said by the late Chief Justice of New York to have been three, and that equity would interfere in the following cases of apprehended injury: 1. To prevent a multiplicity of suits. 2. To prevent irreparable injury to the freehold. 3. To remove a cloud from the title.[1]

What is a cloud upon title? It is not very many years ago that we find Mr. Justice Selden saying that "none of the cases define what is meant by a cloud upon title, nor attempt to lay down any general rules by which what will constitute such a cloud may be ascertained. Each case seems to have been decided upon its own peculiar circumstances."[2] But in that case it is said that, "when such claim appears to be valid upon the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony to establish it, it presents a case for invoking the aid of a court of equity to remove it as a cloud upon the title." In a later case in the same court it is said: "The rule is that when the claim of the adverse claimant to the land is valid upon the face of the instrument or the proceedings sought to be set aside, and extrinsic facts are necessary to be proved to establish the illegality, or invalidity, then a court of equity will interpose to remove the cloud."[3] In another case it is said, "The rule is this: When the claim or lien purports to affect real estate, and appears on its face to be valid; when the defect in it can be made to appear only by extrinsic evidence, which will not necessarily appear in proceedings by the complainant thereof to enforce the lien, there is a case presented for invoking the aid of a court of equity to remove the lien, which is a cloud upon the title."[4]

In a case in Wisconsin we find the court of that State declaring that it did not understand that courts would interfere to remove a cloud which could only be shown to be *prima facie* a good title by leaving the plaintiff's title entirely out of view, or by suppressing a part of the record. "The rule upon this subject assumes always that the title of the party complaining, being shown as it appears of record, then the cloud to be removed is apparently a good title against it, though really defective by something not appearing upon the record."[5] So that if A sells land to B, who puts his deed on record, and A then gives a deed of the same land to C, the latter deed can not be a cloud on B's title, as the record itself shows that at the time A made the second deed he had no interest in the land. In California we find Mr. Justice Field, now of the Supreme Court of the United States, but then the Chief Justice of that State, laying down the following as the test to determine whether a cloud exists upon the title: "Would the owner of the property, in an action of ejectment brought by the adverse party founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast

[1] Guest v. City of Brooklyn, 69 N. Y. 512. See to the same effect Heywood v. City of Buffalo, 14 N. Y. 534, 540.

[2] Ward v. Dewey, 16 N. Y. 529.

[3] Allen v. City of Buffalo, 39 N. Y. 390.

[4] Marsh v. City of Brooklyn, 59 N. Y. 282, 288.

[5] Moore v. Cord, 14 Wis. 235.

by the presence of the deed. If the action would fall by its own weight, without proof in rebuttal, no occasion would arise for the equitable interposition of the court, as in the case of a deed void upon its face, or which was the result of proceedings void upon their face, requiring no extrinsic evidence to disclose their illegality."[6] In illustration it is said that a conveyance not falling in the chain of title, as from one who never had any connection with the property, would not constitute a cloud. And in a still later case in the same court, it is said that if the title against which relief is prayed as a cloud is of such a character, that if asserted by action and put in evidence, it would drive the other party to the production of his own title in defense, it constitutes a cloud upon such person's title.[7] Hence, we conclude that any instrument purporting to create an interest in real estate is a cloud upon title, provided it is void in fact but apparently valid, the invalidity of which does not appear on the face of the instrument, nor upon the proceedings which must necessarily appear in any attempt to enforce the same. So that in Florida it is said that that can not be a cloud upon title upon which an action could not be successfully maintained by the plaintiff in an attempt to enforce the same.[8] So a sale of land by an administrator without an order of the probate court, or under an order void for want of jurisdiction, would not create a cloud.[9] And a title derived through judicial sale based upon proceedings void for jurisdictional defects is not a cloud, because its invalidity must at once appear in any attempt by the party to enforce the same.[10] But where a tax-deed is void because the party had paid the tax before the sale, the instrument or deed casts a cloud upon the title, as the invalidity of the deed depends upon extrinsic facts.[11] But in no case can that be called a cloud which is upon its face void.[12]

But the question arises, will equity cancel a deed which is void upon its face? In New Jersey the court doubted whether equity could interfere in such a case.[13] While in Mississippi,[14] in Tennessee[15] and in an early case in New York[16] the right to decree the cancellation of such deeds was maintained. In the later New York cases the right is emphatically denied. "Whatever opinions," it is there said, "may have formerly obtained, it now seems to be established that whenever it is apparent from the writing or deed itself, that no danger to the title or interest of the complainant is to be apprehended, a court of equity will not entertain a bill for the cancellation or delivery of the instrument."[17] In another case in the same court it is said that no suit lies if the instrument is void upon its face.[18] The same rule also prevails in Connecticut,[19] and it is there said that the reason for the rule is that it would be subjecting a defendant to useless expense and trouble, besides occupying unnecessarily the time of courts, to entertain bills for the cancellation of instruments void upon their face and therefore incapable of working any injury to the owner of the true title. A good illustration of the rule is afforded by those cases which hold that equity will not interfere to remove, as a cloud upon title, tax-deeds based upon irregular assessments, when such deeds have not been declared by statute to be *prima facie* evidence of the regularity of those preliminary proceedings upon which the tax deed is based;[20] while it will interfere, provided the deed is *prima facie* evidence of the regularity of such proceedings.[21] So where a sale of land has been made by an administrator without an order from the probate court, or under an order void for want of jurisdiction, equity will not remove the deed as a cloud upon title, as the defect in the pro-

[6] Pixley v. Huggins, 15 Cal. 127, 133.
[7] Lick v. Ray, 43 Cal. 83.
[8] Davidson v. Seegar, 15 Fla. 671.
[9] Florence v. Paschal, 50 Ala. 28.
[10] Griswold v. Fuller, 33 Mich. 268.
[11] Gage v. Rohrback, 56 Ill. 262; Gage v. Billings, 56 Ill. 268; Gage v. Chapman, 56 Ill. 311.
[12] New York & New Haven R. Co. v. Schuyler, 17 N. Y. 592, 599.
[13] Bogert v. City of Elizabeth, 27 N. J. Eq. 568.
[14] Sessions v. Jones, 6 How. 123.
[15] Jones v. Perry, 10 Yerger, 59.
[16] Hamilton v. Cummings, 1 Johns. Ch. 517.
[17] Cox v. Clift, 2 N. Y. 122.
[18] Scott v. Onderdonk, 14 N. Y. 14. And to same effect, Ward v. Dewey, 16 N. Y. 522; Crooke v. Andrews, 40 N. Y. 547; Guest v. City of Brooklyn, 69 N. Y. 513.
[19] Alden v. Trubee, 44 Conn. 460.
[20] Minturn v. Smith, 3 Sawyer, 142; Crane v. Randolph, 30 Ark. 579; Detroit v. Martin, 34 Mich. 170; Curtis v. East Saginaw, 35 Mich. 508.
[21] Scribner v. Allen, 12 Minn. 152; Minnesota Linseed Oil Co. v. Palmer, 20 Minn. 474; Tilton v. Oregon Central R. Co., 3 Sawyer, 22.

ceedings is patent upon their face.[22] So that the general rule may be said to be that equity will not interfere, to remove, as a cloud upon title, any instrument the invalidity of which would appear in an action brought thereon in a court of law, without making it necessary for the defendant therein to show its invalidity by evidence of extrinsic facts.[23]

But conceding that a cloud upon title exists, equity will not entertain jurisdiction of the bill to remove it, unless the complainant is, at the time of bringing the suit, in possession of the premises.[24] The reason for this rule was the fact that the complainant, being out of possession, could bring an action of ejectment and recover the possession, and in such action the superiority of his title would be made manifest. This rule, however, like all others, is subject to an exception, which it is necessary to notice. Ordinarily, that is in the absence of some statute changing the common law, an equitable title was of no avail in an action of ejectment. So that the reason for the rule, that the complainant must be in possession, failed where the party out of possession had only an equitable title.[25]

Ordinarily, if the complainant was in possession, and it appeared that a cloud existed upon his title, equity would remove it. And it does not seem ever to have been regarded as a ground of objection to such a bill, that the party had a perfect legal defense which would be available in a court of law. In a case where a deed had been obtained by fraud, the objection was urged that in an action of ejectment the complainant could show the deed void. But the court thought that this fact made no difference, and would not prevent the complainant from seeking relief in chancery, adding "no reason is perceived why he can not have it removed as a cloud upon his title."[26] In this respect instruments affecting real estate seem to have been distinguished from those which created a mere personal claim. For we find Mr. Justice Selden, of New York, admitting the rule to be as above stated as to instruments affecting real estate, doubted whether in the case of promissory notes, bills of exchange, policies of insurance, bonds, etc., equity would decree their cancellation provided there was a complete defense to them at law.[27]

Not only would equity in a proper case remove a cloud, but an equitable action could be maintained to prevent a cloud. It was necessary, however, that it should be made to appear that there was a determination to create a cloud, and it was held to be insufficient that the danger was merely speculative.[28] But where it is evident that a cloud is about to be created, equity will not hesitate to interpose; as where a sale is about to be made by a sheriff under execution, the court will enjoin the sale if it appears that it would result in creating a cloud. "The fact that the holder of a cloud on complainant's title may compel him to defend himself against it, with the expense and vexation attending a suit, is the ground upon which bills *quia timet* are placed. And if the court may, to prevent litigation, expense and vexation, entertain jurisdiction to remove a cloud, no reason is perceived why it may not be exercised to prevent the creation of such a cloud."[29]

In some cases it is said that the interference of equity for the prevention of clouds upon title grows out of the inadequacy of the remedy at law, and it has been held, therefore, that where a special legal remedy has been provided, the parties will be left to pursue such remedy, and that equity will not relieve. This was so held in a case in Missouri where an act had been passed in which it was provided that a party in possession of real estate could file a petition in equity, and compel the claimant of title to bring an action at

[22] Florence v. Paschal, 50 Ala. 28; and see Griswold v. Fuller, 33 Mich. 268.

[23] Washburn v. Burnham, 63 N. Y. 132, 134; Marsh v. City of Brooklyn, 59 N. Y. 283; Chaplin v. Craig, 27 Ark. 418; Gamble v. St. Louis, 12 Mo. 617; Simpson v. Howden, 3 Myl. & C. 97.

[24] Shaffer v. Whelpley, 37 Wis. 324; Daniel v. Stewart, 55 Ala. 278; Haythorn v. Margerem, 3 Hal. (N. J.) 342; Niven v. Belknap, 2 Johns. 573; Alton Marine & Fire Ins. Co. v. Buckmaster, 13 Ill. 205.

[25] Shays v. Norton, 48 Ill. 100.

[26] Moore v. Munn, 69 Ill. 594. And see Christie v. Hale, 46 Ill. 122.

[27] Ward v. Dewey, 16 N. Y. 525. This distinction was first taken in Byne v. Vivian, 5 Vesey, 604, and followed in Byne v. Potter, 5 Vesey, 609, as well as in Bromley v. Holland, 7 Vesey, 3.

[28] Sanders v. Village of Yonkers, 63 N. Y. 489.

[29] Groves v. Webber, 72 Ill. 606; and see Goodell v. Blumer, 41 Wis. 436; Key v. Munsell, 19 Iowa, 305; Bank of U. S. v. Schultz, 2 Ohio, 471; Norton v. Beaver, 5 Ohio, 178; Pettit v. Shepherd, 5 Paige, 93; Christie v. Hale, 46 Ill. 122.

law to test the title, or be forever barred from asserting the same.[30] We can not, however, appreciate the force of the argument, and doubt the correctness of the conclusion reached. There is a maxim that if equity once acquires jurisdiction, it will retain it, notwithstanding the law is so changed by statute that it would have been unnecessary for equity to have assumed jurisdiction, if such had originally been the law. We think the principle applicable to this case.

In order to obtain relief from a cloud on title, it is incumbent on the complainant to show title in himself,[31] and not only that, but it is necessary that he should show that his title is a clear one, free from doubt. Complainant must show a title "free from all reasonable doubt."[32] "Courts of equity must be satisfied the complainant has a legal title before granting relief."[33] The complainants "are bound to establish a clear legal or equitable title in themselves, and can not rely upon the weakness of their adversary's title."[34] In a case in Mississippi the court even went so far as to deny the relief when complainant's title was merely a quit-claim deed.[35] "A quit-claim deed," said the court, "implies a doubtful title in the party who executes it; and such being its operation, can it be treated as passing anything more than a doubtful title to the complainant? The rule is that to authorize the court to give relief, the complainant must show a clear title. His deed merely shows a doubtful title." In a case in California it is said: "It is not enough that the deed which it is sought to set aside may possibly be a cloud on the plaintiff's title, but the proofs must clearly show it."[36] As to what in all cases is a doubtful title is a question of difficulty. In a late case in Pennsylvania it is said that "a title is regarded as doubtful when its condition invites litigation."[37] And in an English case it is explained that as to doubtful titles the doubt should be "a considerable, a rational doubt;" and the true question is said to be "whether this is a reasonably clear, marketable title, without that doubt as to the evidence of it which must always create difficulty in parting with it."[38] So that if neither party has title to the premises, neither is entitled to judgment against the other.[39] But in New York the doctrine has been asserted that a party can maintain his bill notwithstanding his defective title, if he is in possession. It is there said that if the opposite claim is without foundation, the assertion of it is a wrong to one in possession, as it makes no difference that there is some other party who might successfully resist plaintiff's title, as such parties may continue to acquiesce in plaintiff's possession and right to the property.[40]

It has been held that a party can not maintain a suit to remove a cloud on title who has no interest in the property further than that he once owned it and conveyed it by a warranty deed. And the reason given for the rule is that equity interferes to remove a cloud because it embarrasses the true owner and tends to impede his free sale, and that the party warranting the title can not be embarrassed or inconvenienced by the existence of the cloud, as he can only be called upon after eviction.[41] But in Connecticut such parties were allowed to maintain a bill brought to remove a cloud.[42] So, too, it has been held that an administrator can not maintain a bill to remove a cloud on title, as he has no title or interest in the lands, the title being vested in the heirs.[43]

Where the owner of real estate gave to another, by an instrument in writing, the exclusive sale and option of purchase of such real estate for sixty days, upon certain conditions, and such person after the expiration of the sixty days, without having notified the owner of his intention to accept the purchase, and without having complied with any of the conditions by the terms of which he was authorized to place the instrument upon record,

30 Drake v. Jones, 27 Mo. 428.
31 Wing v. Sherrer, 77 Ill. 200; West v. Schnebly, 54 Ill. 523; Emery v. Cochran, 82 Ill. 25; State v. Sioux City, 7 Neb. 357; McGee v. Smith, 1 C. E. Green, 466; King v. French, 2 Sawyer, 441.
32 Shotwell v. Shotwell, 9 C. E. Green, 387.
33 Low v. Staples, 2 Nev. 212.
34 Stockton v. Williams, 1 Dougl. (Mich.) 546, 575.
35 Kerr v. Freeman, 33 Miss. 296.
36 Hartman v. Reed, 50 Cal. 485.
37 Kostenbader v. Spotts, 80 Pa. St. 434.
38 Stapylton v. Scott, 16 Vesey, 274.
39 San Diego v. Allison, 46 Cal. 162.
40 Craft v. Merrill, 14 N. Y. 456.
41 Bissell v. Kellogg, 60 Barb. 617. And see Huntington v. Allen, 44 Miss. 654.
42 Chapman v. Hartford, 21 Conn. 499.
43 Ryan v. Duncan, 88 Ill. 144.

had the same recorded, it was held that equity would set it aside as being a cloud upon the owner's title.[44] In equity on a bill to remove a cloud on title of complainant, a mere equitable title is all that is required to support the allegation of ownership of the title.[45]

Inasmuch as bills filed to remove clouds on title are based upon an equity—the principle that it is unfair that one should be allowed to hold an invalid title to the annoyance and vexation of the true owner—it follows that if for any reason it would be inequitable to grant the relief sought, the relief asked must be denied. In a case in Mississippi the court declare: "We can not consent to employ the powers of chancery in removing impediments or clouds to title, where the title relied on is itself of a questionable character. The party who comes in for that purpose must come prepared to sustain the entire fairness of his own title, and if he fail in doing so, the condition of the defendant must be the best. * * * * If there be a well-grounded suspicion that the party has been guilty of fraud, or is seeking an unconscientious advantage, the court ought not to entertain the case."[46] And in New Jersey the court say that where the cancellation of an instrument is sought on the ground of *quia timet*, the complainant should make it appear "that it is clearly against conscience that the instrument should be permitted to remain uncancelled."[47] In another case it is said that relief will be granted if "it is made to appear that the retaining the title or claim is clearly against conscience."[48] In granting relief upon bills brought to remove clouds on title, the court should not require the defendant to convey his title to the complainant, but should simply enter a decree cancelling the instrument which is adjudged to create a cloud.[49]

We have called attention to the fact that, to enable a party to maintain a bill to remove a cloud upon title, it was essential that he should be in possession, and should also have a clear title to the property. Statutes, however, have, in some of the States, been passed enabling a complainant to sue who is not in possession. But the courts hold that this does not dispense with the necessity of showing that he is vested with the legal or equitable title, and entitled to possession.[50]

[44] Sea v. Morehouse, 79 Ill. 216.
[45] Hemstreet v. Burdick, 90 Ill. 444.
[46] Boyd v. Thornton, 21 Miss. 344, 345.
[47] Shotwell v. Shotwell, 9 C. E. Green, 387.
[48] Glazier v. Bailey, 47 Miss. 395, 401.
[49] Rawson v. Fox, 65 Ill. 201.

[50] State v. Sioux City, etc. R. Co., 7 Neb. 357; Emery v. Cochran, 82 Ill. 65.

LIABILITY OF ACCIDENT INSURANCE COMPANIES.

There is much truth in the observation that it is extremely difficult, if not impossible, to formulate a rule or principle which shall apply to a number of cases, each of which depends upon the construction of different instruments. Nevertheless, that observation is deprived of its force where those cases or instruments have certain circumstances in common, and those circumstances are alone sufficient upon which to found the *ratio decidendi*. Hence arises the utility of examining cases such as Winspear v. Accident Ins. Co., 42 L. T. R. (N. S.) 900, which is the last reported case dealing with the rights of a person insured against injury caused by accidental external means. In that case the policy provided that no claim should be made "for any injury from any accident unless such injury should be caused by some outward and visible means," or for "any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease, or any medical or surgical treatment, or operation rendered necessary by disease, or any death arising from disease, although such death may have been accelerated by accident." The assured, in crossing a stream or brook, was seized with an epileptic fit, and fell down, and whilst suffering such fit was drowned. The question raised for the Exchequer Division by a special case was whether his executrix could recover under the policy.

The cases cited as having a bearing upon the question were Fitton v. Accidental Death Insurance Company, Smith's Case, Trew's Case, Sinclair's Case and Reynold's Case, 22 L. T. R. (N. S.) 120.

The condition in Fitton v. Accidental Death Ins. Co., 17 C. B. (N. S.) 122, was that the policy insured against stabs, cuts, concussions, when accidentally occurring from material and external cause, where such accidental injury was the direct and sole cause of death to the insured, or disability to follow his avocations; but there was an exception that the policy did not insure against death or disability arising from hernia or any other disease or cause arising within the system of the insured before or at the time or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury. The death of the insured in this case was from hernia, caused solely and directly by external violence, followed by a surgical operation performed for the purpose of relieving the pa-

tient, and the Court held that the death was not within the exception. On behalf of the company it was contended that the policy did not extend to cover death from hernia and a surgical operation performed to relieve or cure the same. When, however, it was urged that the condition in the policy contained a clear indication that the company would not be liable for death from hernia, not being the direct result of and solely caused by accidental violence, Mr. Justice Williams intimated that the real question was whether hernia which was the result of accidental violence was insured against by the policy. "Looking at the language of the policy," said his lordship, "and taking the first condition altogether, I am of opinion that it means to exempt the company from liability only where the hernia arises within the system." Mr. Justice Willes thought it was extremely important, with reference to insurance, that there should be a tendency rather to hold for the assured than for the company, where any ambiguity arose upon the face of the policy. It was contended on behalf of the assured that rheumatism and gout are always excepted because they always arise within the system; whereas hernia and erysipelas are excepted only when they arise within the system. This view appears to have been adopted by the court.

The Court of Queen's Bench decided the case of Sinclair v. Maritime Pas. Ins. Co., 3 E. & E. 478. Chief Justice Cockburn pointed out that it is difficult to define the term accident so as to draw with perfect accuracy a boundary line between injury or death from accident, and injury or death from natural causes. "We can not think disease produced by the action of a known cause can be considered as accidental," said his lordship. "Thus disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate or atmospheric influences, can not, we think, properly be said to be accidental, unless at all events the exposure is brought about by circumstances which may give it the character of accident." The question was whether death from sunstroke was an accident to the assured within the ordinary meaning of that word. The court came to the conclusion that the death arose from a natural cause, and not from accident.

In Reynold's case, *supra*, Mr. Justice Willes said: "The death resulting from the action of the water upon the lungs, and from the consequent interference with respiration, I think that the fact of the deceased falling into the water from sudden insensibility was an accident, and that consequently our judgment must be for the plaintiff."

One of the provisions in the policy in Smith v. Accident Ins. Co., 22 L. T. R. (N. S.) 861, was that the assured should be insured against all forms of cuts, stabs, tears, bruises, or concussions, when accidentally occurring from material or external causes operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured, or disability to follow his vocation. But it did not insure against death or disability arising from erysipelas or any other disease or secondary cause or causes arising within the system of the assured before or at the time or following such accidental injury, whether causing such death directly or jointly with such accidental injury. The question for the opinion of the court was, whether death from erysipelas, supervening upon and caused solely and exclusively by an accidental wound in the foot of the insured, and but for which wound he would not have had erysipelas, came within the exception, so as to free the defendants from liability upon the policy. The case was heard by Chief Baron Kelly, and Barons Channell, Martin and Cleasby. Those learned judges were not unanimous; but, as the three last mentioned were in favor of answering the question in the affirmative, judgment was entered for the insurance company. Speaking of the words contained in the exception to the provision, Baron Martin expressed his opinion that the object of the company was to include something beyond erysipelas, and that they had done so. The Chief Baron was of opinion, in conformity with what fell from Mr. Justice Williams in Fitton's Case, that the effect of the condition was to exempt the company from liability only in respect of a death from erysipelas where the erysipelas arose within the system, and, further, where the erysipelas was collateral to, and not caused by the accident which had befallen the assured. The majority did not at all differ from the opinion of the Common Pleas as expressed in Fitton's Case.

The decision of the Exchequer Chamber in Trew v. Railway Pas. Ass. Co., 4 L. T. R. (N. S.) 433, has a bearing upon the present case. The defendants agreed to pay the representatives of the assured a sum of money if he died from "injury caused by accident or violence." The policy provided that no claim should be made in respect of any injury, unless the same should be caused by some outward and visible means of which satisfactory proof could be furnished to the directors. The evidence in this case was that the assured went to bathe in the sea, and was not seen alive afterwards. His clothes were found on the beach, and a naked body, believed to be his by some of his friends, was subsequently washed ashore. Chief Baron Pollock directed a nonsuit, ruling that there was no evidence of the death of the insured, or of an accident within the terms of the policy. The ruling was upheld by the full court. In the Exchequer Chamber it was argued that, upon the facts proved, the assured might have died a natural death in the water; that the death had not been caused by any outward visible means; and that there was no proof of death. Chief Justice Cockburn, in delivering the judgment of the court, dealt first with the objection that death by drowning was not within the policy; secondly, with the objection that there was no evidence of such death, and allowed the appeal. To the first objection the *reductio ad absurdum* method was applied. If the policy does not apply where the cause is one which would produce immediate death without outward lesion, then it would not apply to an accidental fall from a

height, or a ship, to a case of suffocation. Then as to the second objection. "There is no ground for supposing he committed suicide," said his lordship. "It is true he may have died from cramp or apoplexy. But the number of persons who die in the water from those causes is very few in proportion to those who die in it from being drowned. If he died from the external cause of the water producing suffocation, the death is a death by external violence within the meaning of the policy."

Winspear's Case differed from Trew's, in that it was admitted as a fact that the assured in the former fell into the stream where he was drowned, when suffering from an epileptic fit, but that he died from drowning. Two questions were raised in the judgment: first, what was the *causa causans* of the death; secondly, was the *causa causans* within the benefit of the policy? "The real *causa causans* in this case," said the lord chief baron, "was the influx of water into the deceased man's lungs, and the consequent stoppage of his breath, and so he was drowned. Anything which led to that, such as his being, if he were, subject to epileptic fits, or being seized with a fit while crossing the stream, would be a *causa sine qua non*. If he had not had the fit, he would probably have crossed the stream in safety, but that does not make the fit the *causa causans*, the actual proximate cause of his death." Was that *causa causans* within the benefit of the policy? The question is concluded by authority. The defendants relied on the words "the insurance shall not extend to any injury caused by or arising from natural disease, or weakness or exhaustion consequent upon disease." Here the death was caused by drowning, and the words quoted are inapplicable. The case is not without difficulty. What, it may be asked, is the rule or principle underlying all the cases? The rule is that, in determining the cause of death or injury, those circumstances must be looked for which indicate the proximate cause, and not any of the more or less remote causes. This rule seems to us to be a reasonable one.

CONSTITUTIONAL LAW—"SPECIAL LAW."

EX PARTE WESTERFIELD.

Supreme Court of California, August, 1880.

A statute prohibiting bakers from carrying on their business on Sunday is "special," and therefore unconstitutional. A law is not "general" within the meaning of the Constitution, simply because it bears equally upon all persons to whom it is applicable. A "general law" must be as broad as its object.

Petition for writ of *habeas corpus*.

MYRICK, J., delivered the opinion of the court:

The petitioner is in the custody of the Chief of Police of the City and County of San Francisco, under a warrant charging a misdemeanor under an act entitled "An Act to regulate and provide for a day of rest in certain cases," approved April 16, 1880. The act provides that "it shall be unlawful for any person engaged in the business of baking, to engage, or permit others in his employ to engage, in the labor of baking for the purpose of sale between the hours of six o'clock P. M. on Saturday and six o'clock P. M. on Sunday, except in the setting of sponge preparatory to the night's work; provided, however, that restaurants, hotels, and boarding-houses may do such baking as is necessary for their own consumption;" and a violation of the act is made a misdemeanor, punishable by fine, or imprisonment, or both.

This act is in conflict with sec. 25, art. 4, of the Constitution, and is therefore void. "The Legislature shall not pass local or special laws in any of the following enumerated cases—that is to say: * * * * Second. For the punishment of crimes and misdemeanors." The act purports, according to its title, to be an act to provide for a day of rest. Instead of pursuing that intent, it goes on to say that certain acts—viz., the labor of baking for the purpose of sale—if performed by certain persons—viz., persons "engaged in the business of baking for the purpose of sale"—shall constitute a crime, and shall be punished. The employees are not to be punished. This is special legislation. A certain class is selected. As well might it have said, if master carpenters or blacksmiths, or if attorneys having clerks, shall labor or permit employees to labor, they shall be deemed guilty of misdemeanor and be punished; carpenters or blacksmiths not master workmen, or attorneys without clerks, may labor at their will. The baking of bread is in itself lawful and necessary. Even if there be authority to restrain the labor on some one day, it must be, if at all, under a general law restraining labor on that day.

Let the petitioner be discharged.

MCKINSTRY, J., concurring.

I concur. I entertain no doubt that the invalidity of the statute under which the defendant was arrested may be determined upon *habeas corpus*.

"Sunday laws" have been held not to be violative of a provision of a Constitution, that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State." *Ex parte* Andrews, 18 Cal. 678. Such laws have been sustained as simply requiring a periodical cessation from labor—the power to pass them resting upon the right of the Legislature to pass laws for the preservation of health and the promotion of good morals. I do not deem it necessary, in this place, to assent to the proposition that a law which enforces, under penalty of fine or imprisonment, a cessation from labor upon Sunday by one whose religious belief has imposed upon him the duty of taking his rest on Saturday, in no degree discriminates against his "religious profession." But admitting the constitutionality of general laws prohibiting all labor on Sunday, or upon any other day, I think the act of April 16, 1880, is a "special law," within th

meaning of those terms as employed in sec. 25, art. 4, of the present Constitution. The act does not declare the business of "baking," as ordinarily conducted, to be a nuisance; nor does it contain any intimation that the business of baking may tend to interrupt divine worship by any class of sectaries, or can otherwise interfere with the rights or privileges of any citizen. The baking of bread is not only lawful and necessary, but we will take notice that there is nothing so peculiar in the occupation as that those engaged in it require—as a sanitary measure or for the protection of their morals—a period of rest not required by those engaged in many other employments.

A general law must include within its sanction all who come within its purpose and scope. It must be as broad as its object. If it is to be made a crime not to refrain from labor during the whole or during any portion of any given day of the week, it must be made equally a crime as to all persons who do not so refrain; or the prohibitory law must be made applicable to all of a class, the members of which, for reasons apparent upon mention of the class, may at least require, for the benefit of their health or morals, a period of rest not beneficial to any other class or individual. We might perhaps take notice that there are controlling reasons why clergymen should not be prohibited from pursuing their pious labors on the Christian Sabbath, and that a law might still be general which included all others, although it excluded them. So we might perhaps hold that there are other special classes who might be permitted to pursue their avocations, notwithstanding a law which prohibited labor by the rest of the community, because of the fact that their peculiar pursuits involved "works of necessity," and placed them beyond the benefits of a law which would compel an enforced cessation of labor by others. But there can be no rule which will permit the prohibition of a particular kind of labor in itself innocent and beneficial to the public. There is no reason, and can be no reason, why bakers should be forced to rest from their labors periodically, which is not applicable to many other classes of artisans and workmen. To say that every law is "general" within the meaning of the Constitution, which bears equally upon all to whom it is applicable, is to say that there can be no special laws.

STATUTE OF FRAUDS.

ROSE v. O'LINN.

Supreme Court of Nebraska, August, 1880.

R's servant being injured by the negligence of W, a physician was sent for by W to treat him. R told the physician that W was responsible for the accident, adding, "But I will see that you are paid." *Held*, that the promise of R was within the statute of frauds.

Error from Washington county.

Davis & Tucker, for plaintiff; *Carrigan & Osborn*, for defendant.

COBB, J., delivered the opinion of the court:

The plaintiff in this case assigns for error the giving of the fourth, fifth, sixth, seventh and eighth instructions, which are in the following words: "4. If it was simply an agreement to pay it if some other party, primarily liable, did not, it was what is called a collateral promise, or a promise to answer for the debt or default of another, and consequently void, by what is known as our statute of frauds, for not being in writing. 5. Illustrations of original and collateral promises may be as follows, which you will understand are merely illustrations: If a person says, 'Go to that pauper and render him services, I will pay you,' that would be an original promise and need not be in writing. If the promise was to render service for such a person, 'He will pay you, but if he does not I will,' that would be a collateral promise, and should be in writing to be valid. 6. But then there are cases where the line between original and collateral promises is not so distinctly drawn, and then it is for the jury, under all the circumstances of the case, to say from the evidence whether the promise was original or not. To decide this you should consider the situation of all the parties, and the language. The question to whom the charge was originally made, or the credit given, is also a very important one in determining this fact. 7. If you find that defendant, Rose, directed the plaintiff to go on and attend to the injured person, and promised to see him paid, and you further find that such promise was an original one, then your verdict should be for the plaintiff. 8. When a witness is impeached—that is, when you find from the evidence that his reputation for truth is such that you can not believe him under oath—then you should disregard the testimony of such witness."

The plaintiff below was called as a witness on the trial in his own behalf, and testified as follows: Question. "Did you have any conversation with Mr. Rose concerning who should pay you? If so, state that conversation entire." Answer. "I had a conversation with Mr. Rose. He stated how the accident occurred. He said that a neighbor of his, Mr. Whisenand, had driven a cow down in his herd. He had a bull in his herd, and Mr. Whisenand had driven a cow down there against his express orders before; that it was generally understood no cows were to go into his herd without express orders from himself. In separating this cow from the herd, the bull ran against the pony of his herder, and, in doing so, had thrown him off, he being a cripple and unable to sit a horse as a man naturally would. That was about the statement he gave as to how the accident occurred. Then he went on to state, in the bedroom where the man was that had got injured, that he was going to see that Mr. Whisenand should pay a portion of the bill, because he was responsible for the accident. After I had adjusted the fracture and applied the dressing we

went out to the breakfast table. Mr. Rose seemed to be very much excited, and he went on and stated in this language, as near as I can remember, after telling the circumstances over again: 'But, doctor, you need not be at all alarmed about your bill; I will see that you are paid.'" Q. "Did he say anything about your continuing your treatment?" A. "He wanted the case attended to, and I did attend to it until the fracture was knit and the splints removed."

It is claimed by the plaintiff in error that the above testimony brings the case within the provisions of the statute known as the statute of frauds, and that the promise of plaintiff in error, to see that the defendant in error was paid, is void because of such agreement, or some note or memorandum thereof, not being "in writing and subscribed by the party to be charged therewith." To present this point in its true light it should be stated that Ira Lee, the person whose broken thigh was set and cured by the defendant in error, a physician and surgeon, was the hired laborer of the plaintiff in error; that the son of the Mr. Whisenand, spoken of by the plaintiff in error, as stated by the defendant in error in his testimony, went for a physician by direction of his father. Whisenand, when about starting his son for a physician, asked plaintiff in error if it made any difference which doctor was sent for. He replied that he did not know as it made any difference to him. Young Whisenand then went for and obtained defendant in error.

In the case of Leonard v. Vredenburgh, 8 Johns. 29, Chief Justice Kent, in delivering the opinion of the court, after citing many English and American cases, says: "There are, then, three distinct classes of cases on this subject which require to be discriminated: (1.) Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. * * * (2.) Cases in which the collateral undertaking is subsequent to the debt, and was not the inducement of it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here must be some further consideration shown, having an immediate respect to such liability; for the consideration for the original debt will not attach to this subsequent promise. * * (3.) A third class of cases, and to which I have already alluded, is when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm, moving between the newly-contracting parties. * * * * The two first classes of cases are within the statute of frauds, but the last is not." Although it can scarcely be said that any construction of the statute of frauds is settled law, yet I find the above case so often referred to and cited that I deem it safe to adopt the principles there laid down; and if we find the case at bar coming within the same, and falling within either of the three classes into which that eminent jurist has divided the subject, we will have to follow it.

It is not claimed nor could it be, that Rose stood in any such relation to Lee as made him liable to pay for his (Lee's) surgical treatment, nor was Rose in any manner responsible for the calling of Dr. O'Linn in the first place; and so, if he is liable at all, his liability grows out of the contract made after the operation on the limb had been performed by the doctor—out of the words spoken at the breakfest table. The doctor had been called in the middle of the night; he had procured a conveyance and driver at the livery stable; had been driven sixteen miles, arriving there at daylight; had performed an important surgical operation, and, as the sequel shows, had done it skilfully and well. At this point it is a plain proposition that somebody was lawfully liable to pay the surgeon for this service, and it is equally clear that that somebody was not Rose; for he stood in no relation to the subject of the services, and up to this time had done nothing to render him liable. In the meantime valuable services had been performed, for which some one was originally liable to pay. If we stop here, there is a perfect cause of action for a part of the doctor's claim, but not against Rose. If, by speaking the words at the breakfast table, Rose became liable, what was the character of his liability? Certainly not original, because we have examined the contract in its original state, and seen that Rose was not there. So such liability must be a collateral one.

I think that the case falls substantially within the second class, as divided by Chief Justice Kent. In the case at bar, the debt was not created or contract made by a single act, like the execution of a note, as in Leonard v. Vredenburgh, *supra*, but extended over a period of several weeks. The promise of Rose was made after the rendering by the doctor of an important part of the services upon which the indebtedness arose, after the relation of physician and patient had been established between Dr. O'Linn and Lee, and the relation of debtor and creditor between the doctor and whoever was primarily responsible for his employment, and we have already seen that that was not Rose. The doctor says in his testimony that Rose "wanted the case attended to"—that is, continued. He does not say how he expressed that want; but I think that might be inferred from the words used, "I will see that you are paid." The doctor did continue the treatment, and such a continuation of the treatment was a sufficient consideration for the promise to bring the case within the said second class. I therefore come to the conclusion that the case is within the prohibition of the statute of frauds; that the promise of Rose, not being in writing nor subscribed by him, is void.

I think the fifth instruction given in the charge to the jury, in the trial court, was calculated to mislead in this: that the subject of the illustration, as well as the manner of stating it, was calculated to impress two points upon the mind of the jury, neither of which were warranted by the testimony—First, that Lee was a pauper; second, that Rose was the original cause of the doctor's treating him. But I place this opinion squarely

on the ground that the verdict is not sustained by any legal or binding contract. The judgment of the district court is therefore reversed, and the cause remanded for a new trial.

Reversed and remanded.

MAXWELL, C. J., dissents.

CONTRACTS IN RESTRAINT OF TRADE—FOREIGN JUDGMENT.

ROUSSILLON v. ROUSSILLON.

English High Court of Justice, Chancery Division, February, 1880.

1. Plaintiffs were champagne merchants at Epernay, in France. Defendant, whose name was the same as that of plaintiffs, having entered their house and learnt the business, acted for two years as their representative in England, and then wrote a letter to them, by which he undertook not to represent any other champagne house for two years after leaving plaintiffs' employment, and not to establish himself or associate himself with other persons or houses in the champagne trade for ten years after leaving them. Defendant left plaintiffs' employment in March, 1877, and in May, 1878, commenced business in London as a retail wine merchant, and sold champagne as well as other wines. In his circulars and advertisements, and on the labels and corks of the champagne bottles, were the words "Ay Champagne," but he had no establishment anywhere except in London. *Held*, that the defendant had committed a breach of the agreement. *Held*, also, that the agreement was valid, as the restriction was not larger than was necessary for the reasonable protection of the plaintiffs. There is no hard and fast rule that a contract in restraint of trade unlimited as to space is invalid, but the validity depends on the reasonableness of the contract.

2. A contract against public policy will not be enforced by English courts, though the contract is valid in the country where it is made, and is entered into between foreign traders.

3. A judgment by default was obtained in France against a Swiss, domiciled in England, on a contract entered into by him while on a temporary visit to France. No notice had been given to him of the action. *Held*, that the judgment was not binding on him. The circumstances which impose a duty upon a defendant to obey the decision of a foreign court stated.

This was an action to restrain the defendant from carrying on the business of a champagne merchant, and for an order for the payment of certain damages awarded by a French court.

The plaintiffs were Jean and Gustave Roussillon, who carried on the business of champagne merchants at Epernay, in France, under the name of J. Roussillon & Co. In 1866 they took the defendant, Auguste Roussillon, who was a nephew of Jean Roussillon, into their employment as a clerk, in order that he might learn the business. After he had been two years in their service at Epernay, he was sent to England in order that he might learn English, and they afterward employed him as their traveler in England, Scotland and other places. This necessitated his being introduced to many of the customers of the firm, and the plaintiffs accordingly suggested to him that for their protection he should enter into an engagement not to compete with them in the event of his employment with them being terminated. In accordance with this suggestion on the 9th October, 1869, the defendant wrote a letter to the plaintiff, J. Roussillon, in French, of which the following is a translation: "As a return for the kindness and care of which I have been the object, and the trouble you have taken in my commercial education, I address this letter to you as a proof that I undertake not to represent any other champagne house for two years after having left you, if at any time I leave your house for any reason whatever, whether it be on your part or my own. I also undertake not to establish myself, nor to associate myself with other persons or houses in the champagne trade (*dans le commerce des champagnes*) for ten years in case I should leave you as already mentioned above. I enter into these engagements trusting to your assurance that I may rest in the idea that my position is assured in your house except in the event of unforeseen events or of negligence on my part in the affairs which are or shall be intrusted to me, and I promise to do all in my power to maintain and increase the good reputation of your house in the countries I am connected with." When this letter was written, the defendant was staying at Epernay for a few days on his way to England from Switzerland, where he had been spending a holiday. He was a native of Switzerland, but resident in England. The defendant continued in the plaintiff's employ until the 1st May, 1877, when he voluntarily left them.

In 1878 the defendant established himself at No. 2, Piccadilly place, London, as a champagne merchant, and advertised himself as selling champagne, and the plaintiffs alleged that by his advertisements and circulars he led people to suppose that he was established at Ay, which is in the neighborhood of Epernay, and that he had applied to many of the plaintiffs' customers, to whom he had been introduced as their traveler, to buy his champagne as well as the plaintiffs', all of which they contended was a breach of the contract of the 9th October, 1869. In September, 1878, the plaintiffs instituted an action against the defendant in the Tribunal of Commerce, sitting at Epernay, to recover damages for the loss sustained by them by reason of the breach by the defendant of the agreement contained in the letter of the 9th October, 1869, and to restrain him from further breach thereof. On the 6th November, 1878, the Tribunal of Commerce gave judgment in the action. The judgment contained recitals of the facts proved and of the proceeding in the action, and then proceeded in the French language, in the words of which the following is a translation: "Say that Auguste Roussillon should not represent any champagne house for two years from the commencement of the year 1878, and that during ten years from the same period he should not carry on business as a champagne merchant either on his own account or in partnership. Order that in a week following notice of the present judgment he shall completely cease to trade as a champagne merchant,

and shall suppress the words, "Ay Champagne," and the mention of champagne wine from his labels, advertisements and circulars. This under penalty of 100 francs damages per day for non-compliance for two months, after which right shall be enforced." Certain other directions were given in the judgment as to notifying defendant, etc. Notwithstanding this judgment, the defendant continued to carry on his business, and to advertise as before, and did not pay the plaintiffs any of the damages awarded by the judgment.

The plaintiffs alleged that they were sustaining considerable loss in consequence of the defendant trading in this manner, and claimed an injunction restraining him from representing any champagne house for two years from the 1st May, 1877, and from carrying on business as a champagne merchant for ten years from the same date; that he might be ordered to pay them the sum of 891*l.* 9*s.*, the amount awarded by the French tribunal, with interest thereon; and also 500*l.* damages. From the evidence it appeared that the defendant was never domiciled in France, but only paid temporary visits to that country, and at the date of the proceedings against him before the Tribunal of Commerce, was residing in England. That those proceedings were taken entirely without his knowledge, and that the first notice he had of them was in November, 1878, when the judgment was handed to him.

From the evidence of a French *avocat* it appeared that according to the law of France contracts in restraint of trade were not void, and that a judgment by default was void if not executed within six months, unless everything had been done that could be done to obtain execution.

FRY, J.

In this action the plaintiffs seek for an injunction on two grounds. The one is a contract contained in a letter of the 9th October, 1869, and the other is a judgment of the Tribunal of Commerce in France of the 6th November, 1878. The two subjects require entirely separate consideration. With regard to the contract and judgment, but few facts are in controversy between the parties, and it does not therefore appear to me to be necessary to state in detail the history of the case, more especially as I shall from time to time in the course of my judgment refer to the facts which I consider have been proved in evidence before me. Now, the first argument raised on the part of the defendant is that no breach of the contract has been committed by him. It becomes, therefore, necessary to consider what are the terms of the contract. They are, so far as it is necessary for this purpose to consider them, in these words: "I undertake not to represent any other champagne house for two years after having left you, if at any time I leave your house for any reason whatever, whether it be on your part or on my own. I also undertake not to establish myself, nor to associate myself with other persons or houses in the champagne trade for ten years, in case I should leave you as already mentioned above." The question in dispute has been this: What is the meaning of the words "champagne trade," in the clause I have read? In my judgment they refer to the trade of exporting from Champagne or importing into this country the wines of Champagne. It has been urged that it involves also the making of the wine in Champagne. It appears to me that that is not a necessary part of the champagne trade, because the trade may be carried on without that, as shown in the present case. The defendant buys his wines in Champagne, and exports them from Champagne into this country, or rather imports them from Champagne into this country, and he affixes to the bottles of wine that he brings over his own brand, which indicates that he is an importer, that he has selected the wine, that in a certain sense he is a guarantor of the excellency of the wine, and he has placed upon it the name of the place at which he buys the wine, namely, Ay, in Champagne. It appears to me that those acts are a violation of the terms of the contract he has entered into. I repeat that the terms of the contract appear to me to be that the defendant shall not act as an importer of champagne from that province into this country, and that trade has been carried on by the defendant. I hold, therefore, that the plaintiffs have established a breach of the contract entered into. In the next place it is said by the defendant that the contract is bad in law. It has been suggested on his behalf that there is no sufficient consideration shown; but as Mr. North has declined, on the ground of the condition and the state of the authorities, to argue that point before me, it does not require adjudication at my hands.

In the next place it is said that the contract is not reasonable, and it is unquestionably the law of this country that contracts of this description, being in restraint of the freedom of trade, must be reasonable. Now, what is the criterion by which the reasonableness of contract is to be judged? I will take the law on that point from the judgment of Tindall, C. J., in delivering the judgment of the Court of Exchequer Chamber, on appeal from the Court of Queen's Bench, in Hitchcock v. Coker, 6 A. & E. 438, where he said (p. 454): "We agree in the general principle adopted by the court, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." That passage was adopted by Lord Wensleydale, when a baron of the Court of Exchequer, in delivering judgment in Ward v. Byrne, 5 M. & W. 548, 561, and therefore the rule so expressed has the authority of the three Common Law Courts, the Queen's Bench, the Common Pleas, and the Exchequer. If, therefore, the extent of the restraint is not greater than can possibly be required for the protection of the plaintiffs, it is not unreasonable. Another case which in my view throws great light upon the mode in which this question ought to be approached, is Tallis v. Tallis, 1 El. & B. 391. There the plaintiff and the defendant had been partners

as publishers of books. Part of their trade, called the canvass trade, consisted in publishing books in numbers, and employing travelers to sell such books by canvassing purchasers. The partnership was dissolved, the plaintiff being the continuing partner. The defendant agreed, amongst other things, not directly nor indirectly to be concerned in the canvassing trade in London, or within 150 miles of the General Post-Office, nor in Dublin or Edinburgh, or within fifty miles of either, nor in any town in Great Britain or Ireland in which the plaintiff or his successors might at the time have an establishment, or might have had one within the six months preceding. The action was for a breach of the covenant. It was pleaded, amongst other things, that there were numerous works which the plaintiff did not publish and had no intention of publishing, and that many of such works might be published with advantage to the public by the defendant, and without injury to the plaintiff; that the canvassing trade applied to all such books; and that the restraint as to the canvassing trade as applicable to such books was unreasonable. The court upon those pleadings, upon a demurrer, held that the declaration was good, it not appearing that the restraint was unreasonable. And in giving judgment they considered a dictum in Mitchell v. Reynolds, 1 P. W. 181, 191, to the effect that: "Wherever such contract *stat indifferenter*, and for aught appears, may be either good or bad, the law presumes it *prima facie* to be bad." But instead of adopting that view they called attention to what was said by the Court of Exchequer in Mallan v. May, 11 M. & W. 653, 667, that "it would be better to lay down such a limit as under any circumstances would be sufficient protection to the interest of the contracting party, and that if the limit stipulated for does not exceed that, to pronounce the contract to be valid." And further on in their judgment they said this: "Even if the facts therein stated are taken to be admitted by the demurrer, and the reasonableness of the restriction in question is to be considered with reference to those facts, together with the facts alleged in the declaration, still we think the pleas bad. For although the books capable of republication may be at most infinite, still the number of subscribers to such republication coming out in numbers is limited; and although if the defendant's books are excluded, it does not follow that the plaintiff's books would be purchased, still we can not ascertain that the number of subscribers to the plaintiff's books would not be diminished if the defendant competed with him by offering other books, especially if they were of a similar character. And unless the defendant made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed if the defendant's intended publications are excluded, according to the general rule before referred to we ought not to hold the contract void." In other words the Court of Queen's Bench threw upon the defendant, who alleged the invalidity of the contract on this ground, the burden of showing that it was plainly and obviously clear that the protection extended, and the proposed exclusion of the defendant's publications was, beyond what the plaintiff's interests required. And such, in my opinion, ought to be the rule of law of this court upon this point, because it is to be borne in mind that the defendant is seeking to put a restraint upon the freedom of contract, and he who does that must, I think, show that it is plainly necessary for the purposes of freedom of trade. In that point of view I adopt the view expressed by the Master of the Rolls, upon the subject of the necessity of courts being careful how they invade the freedom of contract, in Printing and Numerical Registering Company v. Sampson, 32 L. T. R. (N. S.) 354; L. R., 19 Eq. 462, 465. The question then arises, does the defendant in this case discharge the burden so cast upon him? In answering that I must consider the facts of the case. It appears that at the time this contract was entered into, the defendant had for some two years been acting as the representative of the plaintiffs in England. His instructions appear to have been under their direction to travel over all parts of England and over Scotland, and at a subsequent date, not so far as I know at this date, he visited Holland for the purposes of their trade. Further than that, he had, by a residence of some four months in Epernay, at the house of the principal plaintiff, acquired apparently a knowledge of the plaintiffs' trade as carried on in France. He was therefore acquainted with the trade a both its ends. He was a relative of the plaintiffs and bore their name. Looking, therefore, at the extent of trade carried on by the plaintiffs and its diffusion over the whole of England; looking at the facilities which now exists for carrying on trade in various places by means of the freedom of communication which exist between them, I can not say that it has been made plain and obvious to me that this contract exceeds in its extent that which the plaintiffs were entttled to for the protection of their trade. No doubt criticisms may be made on the contract, and it may be said, as it has been said, that you can conceive cases to which the restraint would apply, in which no injury would be done to the plaintiffs. That observation applies to Tallis v. Tallis, 1 E. & B. 391; and when I bear in mind the obvious channels through which trade is influenced, and the great difficulty of providing for every possible case in which injury might arise, without including certain possible cases in which injury might not arise, I have come to the conclusion that it has not been shown to me that this contract is larger than is necessary for the reasonable protection of the plaintiffs, and I hold, therefore, that that objection fails.

But then it is said that over and above the rule that the contract shall be reasonable, there exists another rule, viz., that the contract shall be limited in its space, and that this contract being in its terms unlimited, and therefore extending to the whole of England, meaning England and Wales, must be void. Now, in the first place, let me consider how far such a rule would be reasonable. There

are many trades which are carried on all over the kingdom, which by their very nature and necessities are local. If this rule existed, it would afford a complete protection to the latter class of trade, whilst it would prohibit complete protection of the former class, and an injury which ought not to be wrought without good reason would arise. In the next place, the rule, if it existed, would apply in two classes of cases. It would apply where the want of limitation of space was unreasonable, and it would apply also where the universality of the contract was reasonable. Now, in the former class of cases, those in which the universality was unreasonable, the rule would operate nothing, because that is already covered by the rule that the contract must be reasonable. It would therefore only operate in cases in which the universality of the prohibition was reasonable, that is to say, it would only operate where it ought not to operate. For the existence of such a rule I should require authority. In the next place, this rule is pressed upon me as an artificial rule, an absolute rule, or what has been called by the late Wickens, V. C., a hard and fast line or a hard and fast rule. Such a rule may always be evaded by a single exception. No exception to a rule of this description can be said to be colorable, because you can only judge whether the exception be colorable or not by the principle of the rule; but if the rule, as suggested in this case, be really an artificial one without principle, there is no criterion to tell whether the evasion is colorable or not. It appears to me for these reasons that I ought not to hold such a rule to exist unless it be clearly established. Then how stand the authorities upon the point? There are undoubtedly cases in which it has been said that the restraint must not be universal. Such are the cases of Warde v. Byrne, 5 M. & W. 548, and Hinde v. Gray, 1 M. & G. 195; but looking at the judgments in those cases, and reading them with a view to the subject matter, they appear to me to relate only to cases in which the universality is unreasonable; and more than once in Warde v. Byrne the rule is so explained, although I candidly admit that you may select other passages in the judgment in which the court seems to say that the universality is of itself an objection to the contract. But undoubtedly Wickens, V. C., of whose judgments I can never speak without the highest respect, came to the conclusion that such an artificial rule existed, and so he expressed himself in the case of Allsopp v. Wheatcroft, 27 L. T. R. (N. S.) 372; L. R., 15 Eq. 59. He says (p. 64) that "there has been a natural inclination of the courts to bring within reasonable limits the doctrine as to these covenants laid down in the earlier cases; but it has generally been considered in the latter as well as in the earlier cases, that a covenant not to carry on a lawful trade, unlimited as to space, is on the face of it void. This seems to have been treated as clear law in Warde v. Byrne, 5 M. & W. 548, and in Hinde v. Gray, 1 M. & G. 195, and in other cases; and the rule, if not obviously just, is at any rate simple, and very convenient. No doubt, in the case of The Leather Cloth Company v. Lorsont, 21 L. T. R. (N. S.) 661; L. R., 9 Eq. 345, James, L. J., (then Vice-Chancellor), threw some doubt on the existence of a hard and fast rule which makes a covenant in restraint of trade invalid if unlimited in area." There are earlier cases than the one before James, V. C., which seem to me to be inconsistent with the existence of the supposed hard and fast line. In Whittaker v. Howe, 3 Beav. 383, the case relating to attorneys, it was stipulated that the business should not be carried on in any part of Great Britain for twenty years; and again in Jones v. Lees, 1 H. & N. 189, the covenant was against selling a particular article anywhere in England without the invention of the plaintiff applied to it, and the objection that the covenant was unlimited as to space was taken. "It is objected," said Bramwell, B., "that the restraint extends to all England, but so does the privilege. The cases with respect to the sale of a good-will do not apply, because the trade which is the subject-matter of the sale is local, and therefore a prohibition against carrying it on beyond that locality would be useless." In other words the learned judge explains the inclination of the courts against the universality of a prohibition applying only to cases where the subject-matter of the sale was itself local. That is just the view I take of the earlier cases. Still more important are the observations of James, L. J., in the case of Leather Cloth Company v. Lorsont, 21 L. T. R. (N. S.) 661; L. R., 9 Eq. 345, where he undoubtedly came to the conclusion that no such rule was laid down as has been insisted on before me. Having referred to the cases he says (p. 353): "I do not read the cases as having laid down that unrebuttable presumption which was insisted upon with so much power by Mr. Cohen. All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract." I have, therefore, upon the authorities, to choose between the two sets of cases; those which recognize and those which refuse to recognize this supposed rule; and for the reason I have already mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognize this rule, and I consider that the cases in which an unlimited prohibition has been spoken of as void, relate only to cases where such a prohibition has been unreasonable. It follows, therefore, from what I have said that in my judgment the plaintiffs have established their right upon the contract to have an injunction, the terms of which I will mention hereafter. It appears to me that no sufficient evidence has been given to induce me to award substantial damages to the plaintiffs in this case, and I therefore award them the sum of one shilling and no more.

Before parting with this part of the case, itis

desirable to refer to two other points noticed by Mr. Cookson, because they were fully argued by him, and as to one of them the argument was renewed in the reply. He has insisted that even if the contract of the letter of the 9th October, 1869, was void by the law of England as against public policy, yet inasmuch as that contract was made in France it must be good here; and accordingly he has proved that the law of France knows no such principle as that by which unreasonable contracts in restraint of trade are held to be void in this country. It appears to me to be plain, on general principles, that this court will not enforce a contract against the public policy of this country, wherever it may be made. It appears to me almost absurd to suppose that the courts should enforce here what they consider to be against public policy, simply because the contract happens to have been made somewhere else. In the next place he urged that although the policy of this country promoted trade amongst its native subjects, there was no such policy in favor of the trade by foreign merchants, and the defendant being a foreign merchant, he said he was exempt from the leaning of the English law in favor of trade. It appears to me that that view can not be substantiated, and that an elementary point may be met by a citation from an elementary book, and I will, therefore, only refer to a passage in Mr. Justice Blackstone's Commentaries, in which he deals with the mode in which the English law has regarded trade by foreign merchants. He says (vol. 1, p. 230): "The law of England, as a commercial country, pays very particular regard to foreign merchants in innumerable instances;" and then he goes on to refer to the decision of Magna Charta in favor of foreign merchants. I hold, therefore, that neither of those two arguments on the part of the plaintiffs can succeed, and I only refer to them because they have been fully argued at the bar.

I next approach the question of the judgment obtained by the plaintiffs in the Tribunal of Commerce at Epernay on the 6th November, 1878. That judgment, according to the evidence before me, was obtained without any notice to the defendant. He knew nothing of the pendency of the proceedings until they had matured into a judgment. It is not shown before me that according to the law of France the defendant has had any opportunity, or that there is any power in him to set aside that judgment. The question was put to the French advocate who gave evidence, and he seemed to know nothing of any such provision in the law as seems to have been proved in some other cases. Further than that, it has been shown by him that this judgment is void, according to the French law, if it was not executed within six months, or if the utmost efforts to execute it were not taken. It has not been shown to me that such efforts have been taken, or that execution has been had upon this judgment. That is the state of facts with regard to this judgment. Now arises the question of how far the defendant is bound by it, and the law upon this point I think I may conveniently take from the case of Schibsby v. Westenholz, 24 L. T. R. (N. S.); L. R., 6 Q. B. 155, which has been so much cited and discussed in the course of this case. In that case the court considered the true principle on which foreign judgments are enforced by courts of this country, and they say, referring to the case of Goddard v. Gray (p. 159): "We think that, for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Baron Parke in Russell v. Smyth, 9 M. & W. 810, 819, and again repeated by him in Williams v. Jones, 13 M. & W. 628, 633, that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that any thing which negatives that duty, or forms a legal excuse for not performing it, is a defense to the action." What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign court? Having regard to this case, and to the subsequent case of Copin v. Adamson, 31 L. T. R. (N. S.) 242; L. R., 9 Eq. 345, they may, I think, be stated as these. The courts of this country consider the defendant bound where the defendant is a subject of a country in which the foreign judgment has been obtained; where the defendant was resident in the country when the action began; where the defendant in his character of plaintiff has selected the forum in which he is afterward sued by the other plaintiff; where the defendant has volnntarily appeared, and where he has contracted to submit himself to the forum in which the judgment was obtained; and possibly, if the case of Becquet v. M'Carthy, 2 B. & Ad. 951, be right, another condition must be added, where the defendant has real estate within the jurisdiction in respect of which the cause of action arose whilst he was within the jurisdiction. Now, none of these cases include the present case. In the present case the contract was made between the plaintiffs, or one of the plaintiffs, a French subject, and the defendant, a Swiss subject, at the time the contract was made domiciled in Switzerland, but resident in England, he having been for some two years established as the English correspondent or representative of the plaintiffs' firm. He made the contract during a short stay at Epernay, on his return home from a visit to his mother in Switzerland. At the time of making the contract there was no intention on his part, or so far as I can gather, on the part of the plaintiffs, that the defendant should take up his residence in France, and it does not appear to me that either party contemplated the performance of the contract in France, although, the terms of it being universal, it might be observed or broken anywhere. In that state of circumstances, can I find any thing which makes it reasonable to say that the defendant ought to be bound by the decision of the foreign court? I am at a loss to find any circumstance which renders it reasonable, and therefore it appears to me that the defendant is at liberty to say

that he is not in any way bound by the judgment so obtained against him in the foreign court, and without notice to him, and to which he has in no way submitted; the result of which is that I hold that this judgment is not capable of being enforced in this country, and that the whole of the relief sought by the plaintiffs in the present case in respect of that judgment fails.

Having regard to the large extent to which the plaintiffs have failed, I think that the reasonable mode of dealing with the costs will be to award no costs, but to let each party bear his own costs. There will therefore be judgment for the plaintiffs to the extent of an injunction restraining the defendant from carrying on business as an importer of champagne for the period of ten years from the 1st March, 1877, and from in any other manner acting in contravention of that contract, with one shilling damages and no costs. And I dismiss the action so far as it seeks to enforce the judgment.

ABSTRACTS OF RECENT DECISIONS.

NOTES OF RECENT DECISIONS.

PRACTICE — TIME OF ORDERING REFERENCE — RAILROAD FENCES AND CATTLE GUARDS — DAMAGE TO CROPS — CONTRIBUTORY NEGLIGENCE. — 1. A case in equity should not be referred to a master, under ordinary circumstances, until the court has by decree determined the substantial rights of the parties as to the questions raised in the pleadings. 2. The ordinary fence laws of Tennessee do not apply to railroads. But if they did, there is neither any common law nor statutory obligation upon railroad corporations to construct or maintain cattle guards for the protection of crops growing on the lands over which their roads pass. In the absence of a contract or a charter obligation to construct such guards, no contract to construct them at one place will be implied from the fact that the same company has built such guards at other places. 3. The owner of growing crops, knowing that straying animals can pass over defective cattle guards on the line of a railroad and destroy or injure his crops, can not recover from the railroad company damages for such injury, if he has failed to use all means to protect his crops which a person of ordinary prudence would use. To fail to do this is contributory negligence. United States Circuit Court, Western District of Tennessee. Opinion by HAMMOND, J.—*Ward v. Paducah, etc. R. Co.*

ASSIGNEE AND JUDGMENT CREDITOR—DILIGENCE —PREMATURE EXECUTION—ANSWER OF GARNISHEE —WAIVER OF OBJECTIONS TO FORM — REGISTRATION—LEVY ON BULKY ARTICLES.—1. As between the assignee under a general assignment for the equal benefit of all the creditors, and judgment creditors of the assignor claiming under an execution levy, it is a race of diligence; and the judgment creditor will not be deprived of the fruits of his diligence merely on the ground that the levies were "just before or while said assignment was being written." 2. An execution issued prematurely by a justice of the peace without a sufficient affidavit is not void, but valid until set aside, and no one can take advantage of the irregularity except the defendant, nor can he do so collaterally. 3. The appearance and answer of the garnishee waives the objection to the garnishment notice that although authorized by the officer having in his hands the execution, and signed by him, it was neither filled out nor served by him; nor do these facts give the general assignee of the judgment debtor any ground in equity to follow the fund in the creditors' hands. 4. The registration of a trust assignment for creditors does not perfect the title of the assignee to the assignor's choses in action as against creditors, but there must be notice thereof to the debtor before garnishment, in order to defeat the claim of an execution creditor by garnishment. 5. A levy on bulky articles in a closed cellar, through a crack in the door, will be sufficient if the articles are kept in view by the officer until surrendered by the debtor. Supreme Court of Tennessee. Opinion by COOPER, J.—*Stewart v. O'Bannon.*

ACTION BY INSURANCE COMPANY AGAINST ONE NEGLIGENTLY CAUSING FIRE—JOINDER OF PARTIES.—An insurance company which has been compelled to pay, or has paid, a loss covered by its policy, has, after such payment, a right of action against the person who wrongfully caused the fire and loss, to the amount such insurance company paid, even without any formal assignment by the assured of his claim against the party primarily liable. And the courts have likewise been very firm in supporting the right of the insurance company to bring an action in the name of the assured, and will not allow the latter to defeat such action even by a release or discharge of the person by whose act the damage was occasioned. Hart v. Western R. Co., 13 Metc. 99; Monmouth County Fire Ins. Co. v. Hutchinson, 21 N. J. Eq. 107; Connecticut Fire Ins. Co. v. Railway Co., 73 N. Y. 399. These authorities distinctly affirm this position on the ground that the assured, by accepting payment of the insurer, subrogates the latter to his rights, giving such insurer full authority to sue the party causing the loss in his name. And where the right to maintain an action for a loss by fire through defendant's negligence is assigned to several insurance companies jointly, such companies may maintain the action jointly. Supreme Court of Wisconsin. Opinion by COLE, J.—*Swarthout v. Chicago, etc. R. Co.*

WAIVER—APPEARANCE IN JUSTICE'S COURT.—In an action in a justice's court the court had lost jurisdiction on account of an adjournment from time to time in the absence of defendant. Upon an adjourned day the defendant's attorney answered to the case and applied for a postponement to a later hour the same day. The plaintiff's attorney objected and the application was denied. The defendant's attorney then stated that he appeared specially to object to further proceedings. *Held*, that the defect in jurisdiction was waived by the acts of defendant's attorney. If he had appeared specially and for the purpose of resisting the suit on account of previous irregularities, there would have been no waiver. But if the appearance was for another purpose, and with the view to prolong the pendency of the action, and it contemplated a step adapted to a case regularly on foot, it was a waiver of the prior defects. Falkner v. Beers, 2 Doug. 117; Clapp v. Graves, 26 N. Y. 418; Briggs v. Humphrey, 1 Allen, 371; Rittenauer v. McCausland, 5 Black, 540; Heeron v. Beckwith, 1 Wis. 17; State v. Messmore, 14 Id. 115; U. M. T. Co. v. Whittaker, 16 Id. 220; Baizer v. Larch, 28 Id. 268; Abbott v. Sample, 25 Ill. 107; Swift v. Lee, 65 Id. 336; Ulmer v. Hiatt, 4 Greene, 439; Clark v. Blackwell, Id. 441; Deshler v. Foster, 1 Morris, 403. The motion for a continuance was a step in the cause, and one which meant that the action should

be presently kept on foot, and there was nothing to qualify it. The subsequent explanation did not abate its effect. It was not made until the motion was denied, and at that time the representation of the parties had become complete, and the irregularities were waived. Supreme Court of Michigan. Opinion by GRAVES, J.—*Lane v. Leach.*

FELONIES UNDER FEDERAL LAWS.—1. A defendant indicted for making counterfeit coin is entitled to only three peremptory challenges of jurors under section 819 of the Revised Statutes. The offense is not a felony under any existing act of Congress. 2. All offenses against the United States being statutory, they are not felonies if the punishment be less than capital, unless they are by the statute so declared to be, either in express terms or by necessary implication. 3. In the criminal jurisprudence of the Federal law there are three distinct classes of felonies, not capitally punished. 1st. Where the offense is declared by statute, expressly or impliedly, to be a felony. 2d. Where Congress does not define an offense, but simply punishes it by its common-law name, and at common law it is a felony. 3d. Where Congress adopts a State law as to an offense and by that law it is a felony. 4. Congress has power to create felonies or reduce common-law felonies to misdemeanors; but such gradation is inapplicable to our system of jurisprudence; and in the present state of legislation, to declare an offense a felony is *brutum fulmen*, except that it may incline the legislative mind to more severe punishment. In other respects it seems an advantage to the offender, for he then has ten challenges instead of three, and possibly may be entitled to be proceeded against only by indictment and not by information. United States Circuit Court, Western District of Tennessee. Opinion by HAMMOND, J.—*U. S. v. Coppersmith.* 13 Alb. L. J. 250.

SUPREME COURT OF PENNSYLVANIA.

March-July, 1880.

BAILMENTS—WAREHOUSE RECEIPTS—WHO MAY ISSUE NEGOTIABLE WAREHOUSE RECEIPTS.—1. In order that a receipt for goods on storage may be a warehouse receipt with the quality of negotiability, as contemplated by the act of September 24, 1866, the person issuing such receipt must be in possession of the goods in his own right, and not merely as agent for a principal. 2. A pledgee of goods on storage, who has never made himself known to the bailee nor obtained possession of the goods, can not maintain replevin against the bailee, who has parted with the goods by order of the pledgor to a *bona fide* purchaser for value before the writ of replevin issued. 3. A & B were warehousemen and lessees of a wharf, to take charge of which they employed C. D obtained from C a receipt showing that C had received and held certain iron on the wharf subject to D's order, and then pledged the iron to E, a bank, as collateral for a loan, indorsing the receipt to E, who never notified C or his employers. Afterwards D fraudulently obtained a warehouse receipt from A & B, who knew nothing of the pledge, and sold the iron to F, to whom A & B issued a new receipt in his own name upon surrender of the original. D becoming insolvent before the loan was paid, E, being unable to obtain the iron from C, brought replevin against him: *Held*, that E was a mere pledgee, without possession, and could not recover. Affirmed. Opinion by GORDON, J.—*People's Bk. v. Gridley.*

NEGLIGENCE—MUNICIPAL LAW—FAILURE TO REMOVE OBSTRUCTIONS FROM STREETS.—1. C, in driving through the streets of Scranton, an incorporated city, was upset by the iron head of a water plug, and injured. The plug, as originally placed by a gas and water company, incorporated before the city, projected an inch above the grade of the street; after the city's incorporation, and before the accident, the street level had been lowered so that the plug projected six inches, and the city officials were aware of that fact. In an action for damages brought by C against the city, the defendant asked the court to charge that if the obstruction had been placed in the street under the authority of the State, there could be no recovery against the city, which point was negatived: *Held* (affirming the ruling of the court below), that it mattered not who placed the obstruction in the street, provided the city had notice of its existence and failed to remove it. 2. A charter granted to a gas and water company to make necessary structures in a village, afterwards incorporated, to enter upon and occupy streets for the construction of its works, and to make ditches and lay pipes, does not relieve the subsequently chartered city from the consequences of its neglect to remove permanent obstructions from its streets. Affirmed. Opinion by TRUNKEY, J.—*City of Scranton v. Catterson.*

CARRIERS OF PASSENGERS — NEGLIGENCE—BURDEN OF PROOF.—1. Where, for a consideration, a railroad company undertakes to transport a passenger from one point of its line to another, there arises an implied contract upon the part of the company that it has, for that purpose, provided a safe and sufficient road, and that its cars are sound and roadworthy; where the passsnger is injured by any accident arising from a collision or defect in machinery, he is required, in the first place, to prove no more than the fact of the accident and the extent of his injury; a *prima facie* case is thus made out and the *onus* is cast upon the carrier to disprove negligence. 2. In the present case, the legal presumption was that the injuries to the plaintiff were caused by the negligence of the defendant, and that this presumption continued until a countervailing presumption of fact was established; this presumption might have been overthrown by proof to the satisfaction of the jury that the injury complained of resulted from inevitable accident, or from something against which no human prudence or foresight could provide. 3. Defendants' point requiring the instruction that if the railroad in question had been constructed under the supervision of a competent engineer, and that the drainage at the place at which the accident happened was provided for in a manner directed and approved by him, that subsequently the road was leased to the defendant, and that the embankment was washed out by a storm of unusual violence, the defendant was not liable for any error of judgment of the engineer, even if such error occasioned the accident, was properly refused. Affirmed. Opinion by GORDON, J.—*Philadelphia, etc. R. Co. v. Anderson.* 27 Leg. Int. 378.

SUPREME COURT OF ALABAMA.

December Term, 1879.*

PARTNERSHIP—CONSTRUCTION OF AGREEMENT.—1. Where the rights of third persons are concerned, who have dealt with parties associated in business, a partnership may arise by mere operation of law, being

*From the *Southern Law Journal and Reporter.*

implied from a community of profit and loss, even in opposition to the expressed intention of the parties themselves; but, as between the parties, the question whether a partnership exists is one of intention; and when their agreement has been reduced to writing, the intention must be collected from the words of the instrument, construed in the light of the circumstances surrounding the parties at the time it was entered into, the occasion which gave rise to it, and the object to be accomplished by it. 2. A written agreement, signed by C, H and E, which, after reciting that C "is desirous of enlarging and extending his present commission business,and desires to engage the services of H and E," and that the parties therefore "enter into the following agreement," contains the following stipulations: 1st, "that C is to invest a capital of $10,000 in the business," which is to be conducted at Selma in the name of C & Co., and is to be allowed eight per cent. interest on all funds he invests in said business;" 2nd, that he is to employ the services of E at a salary of $1,500 a year, and all other help needed in said business;" 3d, that "for the influence and business qualifications of H, said C agrees to give him the half of the net profits of said business, after all expenses are paid:" 4th, that C is not to draw out any part of the $10,000 invested by him in the business until the day specified for its termination, "at which time he is to pay said H his half of the net profts of said business, if any;" 5th, that each of the three parties agrees to give his whole time and attention to the business, and by which H further agrees to pay the half of all losses the business may sustain, if any—creates a partnership between C and H, as between themselves. 3. A writing which is complete in itself, and which was executed with deliberation, is the sole memorial of the contract between the parties, and all prior negotiations or stipulations are presumed to have been merged in it; and in the absence of fraud or mistake, its terms can not be varied by parol evidence. Affirmed. Opinion by BRICKELL, C. J.—*Couch v. Woodruff.*

JUDICIAL OFFICER—LIABILITY FOR JUDICIAL ACTS —MUNICIPAL ORDINANCE.—1. A judicial officer is not liable to a civil action for damages at the suit of a person aggrieved; so long as he keeps within his jurisdiction, neither malice nor error, nor both combined, will suppport a private action against him. 2. Jurisdiction is the power to hear and determine a cause. When a person is brought before the mayor of a municipal corporation, charged with a violation of a by-law or ordinance of the corporation, the existence of a by-law or ordinance, established and promulgated by the proper authority prior to the commencement of the prosecution, is an essential element of his jurisdiction; but the reasonableness of the by-law or ordinance, while affecting its validity, is a question for his decision, and is not a question affecting his jurisdiction in the particular case. 3. Where the charter of a municipal corporation provides that every ordinance passed by the board of aldermen shall be approved and signed by the mayor, or, if disapproved by him, shall be passed over his veto by a two-thirds vote of a full board, it is not essential to the validity of an ordinance that it shall be signed by the mayor, when it is copied at length in the minutes of the board, which are signed by the mayor, and which show that he voted for it on its passage by the board. Tested by this rule, the "Revised Code of the City of Selma," adopted by an ordinance on the 31st December, 1870, was legally adopted. Reversed and remanded. Opinion by BRICKELL, C. J.—*Woodruff v. Stewart.*

CONFESSIONS — WHEN NOT ADMISSIBLE. — 1. The more recent authorities favor the admissibility of confessions, though obtained by promises or threats, unless such promises or threats were made by an officer of the law; but this court adheres to its former decisions, and holds a confession inadmissible when obtained by any improper inducements or representations made to the prisoner by a person having any connection with the prosecution, or who may be reasonably supposed by the prisoner to have the power to perform, or secure the performance of his promises or threats. 2. Under this rule, the confessions of the prisoner in this case, made while he was in jail under a charge of burglary and larceny, to a person who was a clerk in a store-house,and a part owner of the goods stolen from it, ought not to have been received, because they were obtained by the clerk's promise not to prosecute him, and not to appear as a witness unless compelled to do so. 3. If, in consequence of statements made by the prisoner, a part of the stolen goods are found in the possession of a person named by him,that fact is proper for the consideration of the jury, but it does not render his confessions of the commission of the crime, when obtained by improper inducements, competent and admissible evidence. Reversed and remanded. Opinion by BRICKELL, C. J.—*Murphy v. State.*

LIQUOR LAWS—"ON OR ABOUT HIS PREMISES." —*Held*, on the authority of the case of Pearce v. State, 40 Ala. 720, that the defendant was properly convicted of selling liquor drunk "on or about his premises" (Code, sec. 4204), on proof that the sale was made in a field where he was working with others, more than a mile from his house. Affirmed. Opinion by STONE, J.—*Powell v. State.*

PAYMENT UNDER MISTAKE—FORGED INSTRUMENT —NEGLIGENCE—LIABILITY.—1. Money paid under a mistake of a material fact may be recovered in an action of *assumpsit* on the common counts, although the person making the payment had in his power the means of ascertaining the facts, and was guilty of negligence in not ascertaining them; yet such negligence on his part is a fact for the consideration of the jury in determining whether his alleged ignorance is real or feigned. 2. On this principle, a person who discounts a negotiable instrument to which he is not a party, and which was in fact forged, may recover back the money so paid; but, when he is a party to the instrument, and stands in such a relation to the other parties that he ought to know whether or not it is genuine, he can not recover money paid on it. 3. The acceptor of a bill of exchange is chargeable with a knowledge of the drawer's signature, and can not recover money paid on a forged signature; but if a material alteration is made in the draft after it has been signed by the drawer, and the drawee was not guilty of any negligence in the matter, he may recover the money paid on it in ignorance of the alteration; yet not against the drawer, unless negligence can be attributed to him. 4. As between persons equally innocent, where one is bound to know and act upon his knowledge, and the other has no means of knowledge, the latter will not be burthened with a loss, in exoneration of the former; and when one of two innocent persons must suffer from the tortious act of a third, he must suffer the consequences of the act who gave the wrong doer the means of doing it. 5. A letter authorizing the person to whom it is addressed to draw on the writers for any cotton he may purchase in a named city, provided the draft is accompanied by a bill of lading for the cotton, and does not in amount exceed three-fourths of the market price of the cotton, binds the writers, as in favor of any person, who, on the faith of the letter, advances the money to buy the cotton, for a draft which conforms to the prescribed conditions, although the accompanying bill

of lading is not genuine; and having paid the draft, they can not recover the money by action, on discovering the fraud in the bill of lading. Reversed and remanded. Opinion by BRICKELL, C. J.—*Young v. Lehman.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

September, 1880.

TAXES—PAYMENT BY SECOND MORTGAGEE—ACTION TO RECOVER AGAINST OWNER OF EQUITY OF REDEMPTION.—A plaintiff, who has taken possession of land under a title acquired by sale under a power of sale contained in a second mortgage thereof and who, to prevent an advertisement, expenses and sale of said land under legal tax liens for taxes assessed thereon to the defendant, has paid said taxes to the collector, can not maintain an action to recover the amount so paid against the defendant, to whom a third mortgage has been made, and who, under the power of sale contained therein, which provided that the mortgagee might purchase at the sale, has sold said land to a third person and received a reconveyance thereof from said third person, without any real consideration, to himself. The taxes paid by the plaintiff not being primarily a debt of the defendant, secured by a lien on the land, but being primarily a charge upon the land itself, the defendant is under no implied obligation to repay to the plaintiff the amount paid by him to relieve the land from that charge. The plaintiff has no greater right of action against the defendant than any purchaser of land by a quit-claim deed, containing no covenant against incumbrance, has against his grantor for the amount of taxes previously assessed thereon to the grantor and afterwards paid by the grantee. Opinion by GRAY, C. J. —*Swan v. Emerson.*

WILL—BEQUEST—CODICIL—REVOCATION.—A testator gave his entire estate, with trifling exceptions, to trustees; and by the seventh article of his will they were required to pay to his son E the income of $4,000 "as long as he shall live, and if his wife S should survive him, then to pay such income to her as long as she shall live." By a subsequent codicil he increased this bequest to E, and besides directing the trustees to pay him the income of $4,000, he directed them to pay the income of the additional sum of $2,000 "to be paid in the same way and manner." By another and later codicil he directed the trustees "to pay the income of $4,000, in addition to the income of $6,000 hereinbefore mentioned in any will and codicil," to each of his sons, E and G, "so that they shall have each of them the income of $10,000 during their life; the principal sum on their decease to lapse into the residue of my estate. In all other respects I ratify and confirm my said will and codicils." *Held*, that by the latter codicil the gift to the wife of E was revoked. Opinion by LORD, J.—*Crafts v. Hunnewell.*

DEVISE—POWER TO SELL—MORTGAGE.—Where a wife, being seized in fee in her own right of certain real estate, devised the same by will, as follows: "I give, devise and bequeath to my said husband and executor, so much of any and all my estate, whether real or personal, of which I may die seized or possessed, as may be sufficient for his comfortable maintenance and support for and during the term of his natural life, he having full power to sell and convey any and all of my real estate at any time, if necessary to secure such maintenance," and disposed of the remainder by a residuary clause, it was *held*, that the husband could not, under the power to sell given in the will, mortgage the estate for a part only of its value. Opinion by MORTON, J.—*Hoyt v. Jaques.*

ENTIRE CONTRACT — UNDISCLOSED PRINCIPAL—SEVERANCE.—In an action of contract to recover the price of certain plate glass, it appeared that the defendant, being about to erect a building, authorized B, an architect, to draw plans and specifications for the same, and to receive proposals for the materials and labor; that, in pursuance of said authority, the said B received from H & Co., a firm doing business as glass dealers, a proposal to furnish the glass specified as needed in the building, and the defendant accepted the same; that said H & Co. were selling agents for the plaintiffs for the article of plate glass; that the plate glass, being a part of that furnished under said proposal, was the property of the plaintiffs; and that H & Co. considered they were acting for the plaintiffs as to said plate glass; but no evidence was offered of any information as to that fact to the defendant or his agent. *Held*, that the contract made by the defendant was an entire contract, and that the plaintiffs could not sever the same and maintain this action in their own name, and subject the defendant to a separate suit for the value of the property belonging to them and included in the contract of sale. Clark v. Baker, 5 Met. 453. Opinion by ENDICOTT, J.—*Roosevelt v. Doherty.*

QUERIES AND ANSWERS.

[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

42. At a sheriff's sale under execution for taxes, land worth $1,000 is sold as the property of A and B for $200. The amount of taxes and costs is $50. A has the real title, B a former tax title for which he paid a nominal sum. How will the court dispose of the surplus proceeds of the sale? Can the superior title of A be considered by the court in such case? Under the tax laws of Missouri can the title of each defendant be sold separately?

Keytesville, Mo. X.

43. In a State whose statute (as in Iowa), provides that all actions must be prosecuted in the name of the real party in interest, can a foreign executor in possession of a note due his testator bring an action in his own name and right on such note? See 45 Iowa, 149, and authorities. H.

Cedar Falls, Ia.

ANSWERS.

40. [11 Cent. L. J. 238.] The Supreme Court of this State, in interpreting our claim laws, have been careful to give them a construction so liberal as to make subject to levy and sale any substantial equitable interest that one might have in property, regardless of the legal title. Sterling v. Arnold, 54 Ga. 690. In Rawson v. Coffin, 55 Ga. 348, where "the defendant in *fi. fa.* went into possession of the land after the date of the judgment under bond for title, and paid part of the purchase money, and then sold the land to claimant, who took title by deed from the vendor to defendant, with the assent and by direction of the defendant, the land is subject to the execution." A.

Savannah, Ga.

CURRENT TOPICS.

New Year's day in Texas is not *dies non juridicus*. In *Dunlap v. State*, 4 Tex. L. J. 49, the defendant being under indictment for murder, his case was called on December 29, 1879, when, the counsel for the State announcing that he was not ready, it went over. It being called again on the first day of January, 1880, the defendant excepted to the trial taking place then, on the ground that by the statute law of the State of Texas, the first of January was established as a legal holiday. The court overruled the exception and the trial proceeded. On appeal the Court of Appeals affirmed the ruling of the trial court. Winkler, J., said: "With regard to the objection of the defendant to being put on trial on the first day of January, on the ground that that day was a legal holiday, we are of opinion that he was not deprived of any legal or substantial right by the action of the court. Whilst it is true that by statute of this State, certain days, and among them the first day of January, are declared holidays, on which all the public offices of the State may be closed, and shall be treated and considered as Sunday or the Christian Sabbath, for all purposes regarding the presenting for payment or the acceptance, and of protesting for, and giving notice of, the dishonor of bills of exchange, bank checks and promissory notes placed, by law, upon a footing of bills of exchange; and that all the exceptions and requirements usual on legal holidays may be observed on the several days named in the statute as holidays, and whilst provision is made for the observance of the holiday, should the day named fall on Sunday, and for the presentation, etc., of negotiable paper, in such state of case, (R. S., arts. 2865-6-7) we fail to find, that by word or implication, our law-makers ever intended that the courts of the State should suspend proceedings on the days named as legal holidays, except at their own discretion, or that these days are assimilated to Sunday or the Christian Sabbath, except in relation to civil matters, such as the presentation of negotiable paper for acceptance or payment, protests and the like. To the extent that holidays have been assimilated to Sunday by statute, they must be enforced, but we apprehend no further. They are not to be held the same as the Sabbath day or as not a day for judicial or legal proceedings, or as the Sabbath is denominated: *Dies dominicus non est juridicus*. Broom's Leg. Max. With us the rights, duties and privileges of the citizen, as well as what duties may be performed by courts and officials, are regulated by statute law; but we nowhere find that except as above stated, the general provisions of the statutes respecting the Sabbath or Sunday applied to legal holidays. In the present case it appears, by the record, that the day of the week on which the trial commenced was not Sunday but Thursday; we are of opinion the court did not err in refusing to further postpone the trial because the day was, under the civil statutes, a legal holiday." As to what is meant by declaring a certain day a "holiday," there are several adjudications which seem to conflict with the decision of the Texas Court. In Lampe v. Manning, 38 Wis. 673, the Supreme Court of Wisconsin held that the term "holiday" used in a statute imports *dies non juridicus*; that no authority exists on that day to do any official act, although no express prohibition is found in the statute; that a prohibition is implied in the word "holiday." So in *re* Worthington, 3 Cent. L. J. 526, Hopkins, J., sitting in the United States District Court for the Western District of Wisconsin, ruled that a judgment docketed on Christmas day was a nullity, following Lampe v. Manning. Though this ruling was reversed in the Circuit Court by Drummond, J., it was upon the point that the act of docketing a judgment was a ministerial and not a judicial act, and ministerial acts performed on a *dies non juridicus* were not prohibited at common law — a conclusion open to question. But the proceedings in the Texas case were certainly "judicial."

The *Law Times* in discussing the late alteration by Parliament of the English law of master and servant says: "An action which was brought on Wednesday last in the Queen's Bench Division (Bœdeker v. Cotton Powder Company) affords a good illustration of the working of the existing law respecting the liability of employers for injury caused to a servant by a fellow servant. The plaintiff's case was that whilst in the defendants' employment, he had been directed by the manager to perform certain work in their detonator factory. The work was perilous, but the plaintiff, who at the time was only thirteen years of age, was not aware of the danger. During such employment an explosion took place by which the plaintiff was severely injured. It was alleged that the accident occurred through the incompetence of the person under whose supervision the plaintiff was placed, and through defects in the appliances at the factory. The late engineer of the defendant company stated that there were objections to the building used by the defendants, and to the machinery, and that the machine which had caused the explosion was not a safe one to work. The plaintiff's claim was accordingly admitted. It is well settled that an employer is liable to fellow workmen in respect of certain accidents. For instance if the accident is due to the employer's neglect to select proper and competent workmen and managers (Wilson v. Merry, L. R. 1 Sc. Ap. 332), or to supply adequate resources for the work; but if the workman chooses to accept the employment, or to continue in it with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. It has been suggested that if a workman becomes aware of a peril or danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the necessary means to prevent mischief, his proper course is to quit the employment. Probably under the existing law this is correct. Assuming the rule to be so, it would not, of course, affect a claim based upon an allegation that the employer did not exercise a reasonable care in selecting a manager or workman through whom the accident happened." We have had several inquiries from subscribers concerning the provisions of the new law of England on this subject. We have not yet seen the full text of the act in any of our foreign exchanges. The bill as first introduced was materially amended in both houses, and as we learn from the comments of the English papers, is far from satisfactory to the advocates of a change in the old law.

RECENT LEGAL LITERATURE.

JARMAN ON WILLS.

In the second volume of this edition of Mr. Jarman's old and favorite work, the American editors have found less opportunity for the appending of their valuable notes. The first of their three volumes covered only about one-half the ground occupied by the first volume of the original work. With the remain-

der of that volume are incorporated 250 pages of the second volume of the English edition, in order to make up the second volume, now before us, of the Jersey City edition. Still, this volume not only fills its appropriate place in the series, but exhibits evidences of painstaking work, in the 100 or more pages of notes which have been added by Messrs. Randolph & Talcott. Of especial value is the note under Chapter 30, treating of Devises and Bequests to Children, where are collected in detail, and duly classified, the American cases wherein the term "children" has been defined or construed, those involving the construction of devises to a class whose extent or number has been changed or enlarged between the time of making the devise, and the time when it goes into operation, and those involving the distribution of property *per capita* or *per stirpes*. Several extended extracts from Theobald on Wills, in one instance including an entire chapter, are appended as notes to the chapter above named, a feature which many will no doubt find convenient who have but small libraries. The American cases are collected in notes under the respective heads of Devises to Illegitimate Children, Constructive Conversion, Trusts for Conversion, Execution of Powers by Devises, Effect of Repugnancy or Contradiction in Wills, and Supplying or Transposing Words. To Chapter 33, concerning the words necessary to comprise the general personal estate, and Chapter 27, which treats of Conditions in Wills, are appended notes of considerable length and of especial value, presenting both English and American citations. In short, we find this volume, like the first, exhibiting the work of the industrious editors, extensively and quite evenly distributed throughout the several chapters and pages of the book. With a full and compendious index, this edition will, when completed, be a very useful working edition of Mr. Jarman's invaluable treatise.

NOTES.

——James P. Sinnott, one of the judges of the Marine Court of New York City, died last week. He was born in Ireland in 1838.——The Governor of Illinois has ordered an election for four additional judges in Cook County, Ill., in accordance with a law passed in 1875, providing that for every 50,000 inhabitants over and above a population of 400,000 in the County of Cook, there shall be added one judge to the Superior Court of Cook County until said court shall be composed of nine judges. This order is based upon the official certificate of the superintendent of the census, that the population of Cook County is 607,568 inhabitants.

——The English law reporters sometimes nod, it seems. The *Law Times* says: "Subscribers of the Law Reports are requested to cancel five pages in volume five of the Queen's Bench Division, and two pages of the same volume of the Common Pleas Division. The first cancellation has reference to a judgment of Mr. Justice Lush in the case of South Eastern Railway Company v. Railway Commissioners. These reports will lose much of their value if it is generally known that the judges do not revise their judgments before they appear."——A man may be prodigal in defending his rights as well as in other affairs. "Employing three counsel," says Malins, V. C., in *Mason v. Brentini*, 42 L. T. (N. S.) 728, "is a luxury of litigation."——An exchange asks: Will bad table manners vitiate legal grounds of action? A collision recently occurred while an Italian commercial traveler was eating a bologna sausage on a railway train. The shock of the collision drove the knife so violently against his mouth as to widen it. He brought suit for damages. The defense was that the injuries were caused by the knife; that the knife should never be carried into the mouth, and that the plaintiff having injured himself by reason of his bad habits in eating, must take the consequences and pay his own doctor's bill.

——The eminent legal talents of Sergeant Armstrong, the leader of the Irish bar, were, it is said, first discovered by the following incident: It happened at the Wexford Assizes that a little boy was indicted for the murder of a play-fellow, and being in humble life, his friends were without means of employing counsel for his defense. The proof of his guilt depended on circumstantial evidence, but so clear that there was no hope for the boy. He had the brogues that belonged to the murdered boy; he had a knife that was also his, and a ball with which they played. These articles were found with him directly after the murder. Chief Baron Pennefather assigned young Armstrong as counsel to defend the lad. Having read over the information, he saw what a slender hope there was of saving the boy's life. So he applied that the trial might be postponed, and the judge assented. During the next assizes in Clonmel he was one day caught in a shower of rain, and taking refuge in a bootmaker's shop, the thought struck him to ask how one pair of boots could be distinguished from another made on the same last, and the bootmaker informed him that identification was impossible, except with regard to the boots on which he was in the habit of putting a private mark. Here was the argument against conviction. Then as to the knife, there were hundreds of the same kind sold by every peddler. When the assizes came round at Wexford, he cross-examined the Crown witnesses with telling effect in reference to the identity of the brogues and the knife. But then there was the ball, and the mother of the murdered boy, Moore, swore she herself made it, winding it round a piece of crumpled-up brown paper. Surely this was conclusive. Young as he was, the little fellow at the bar saw the force of her evidence, and asked to see his counsel. Mr. Armstrong went to the side of the dock and the prisoner whispered in his ear—'I unwound the thread and put it on again on a cork to make the ball hop.' At the close of the evidence for the Crown the case seemed proved to demonstration, in so much that the prosecuting counsel left it in the hands of the judge and jury. But Mr. Armstrong rose, and with great power of analysis sifted the evidence, maintaining that the only real proof was that in reference to the ball—'My client's life hangs upon a thread, and if it should so happen that the thread is wound on paper, as the unfortunate mother of the youth who was murdered describes, then my case is lost. Let the ball be unwound, and to you, gentlemen of the jury, I commit my client's safety.' The end of the thread was handed to the foreman and amid breathless stillness it was unwound. At last down fell the cork, and a cheer in court proclaimed the safety of the prisoner, if not his innocence.

A Treatise on Wills, by Thomas Jarman, Esq. In Three Volumes. Vol. II. Fifth American, from the Fourth London Edition, with notes and references to American decisions. By Joseph F. Randolph and William Talcott, of the New Jersey Bar. Jersey City, N. J.: Fred. D. Linn & Co. 1880.